



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 2 OF 2015**

EMAN KAMUNYA KITHAKA.....PLAINTIFF

VERSUS

PETER KINYUA KAMUNYA.....DEFENDANT

**JUDGMENT**

The plaintiff filed this suit on 27<sup>th</sup> January 2015 praying for judgment against the defendant in the following terms:-

- a. ***Cancellation of the registration of the defendant from the register as the proprietor of land parcel No. KIRINYAGA/GATHIGIRIRI/698 and subsequent registration of the plaintiff as the proprietor of land parcel No. KIRINYAGA/GATHIGIRIRI/698.***
- b. ***Costs of the suit.***
- c. ***Any other or better relief that this Honourable Court may deem fit to grant.***

The claim was premised on the pleadings that at all material times, the plaintiff was the lawful owner of the land parcel No. KIRINYAGA/GATHIGIRIRI/698 (hereinafter the suit land) and had given a portion thereof to the defendant who is his grandson for the sole purpose of constructing a dwelling house only to discover that on 7<sup>th</sup> January 2015, the defendant had fraudulently transferred the same to himself. The particulars of fraud were pleaded in paragraph six (6) of the plaint as follows:-

***6 (a) Transferring the suit land unlawfully***

***(b) Registering transfers without proper and/or valid consents from the relevant Land Control Board.***

***(c) Forging the plaintiff's signature and/or thumb print.***

***(d) Conspiracy to defraud.***

In his defence however, the defendant pleaded that the suit land was given to him as a gift by the plaintiff without any duress or undue influence. He denied the allegations of fraud and put the plaintiff to strict proof adding that the suit was instituted through ill-will.

The trial commenced on 1<sup>st</sup> October 2015 with the plaintiff whose age was later given by his son (PW2) as 95 years adopting his statement and producing his list of exhibits (Plaintiff's exhibits 1 to 3). He was then cross-examined by the defendant. The gist of his evidence is that he is the registered proprietor of the suit land and gave the defendant who is his grandson a portion to construct his house

since he has no other place to live but later, he discovered that the defendant had fraudulently transferred it to himself. That this transfer was done without his knowledge or consent.

The plaintiff called his son (DAVID KARIUKI KAMUNYA) as a witness. He confirmed that the suit land belongs to the plaintiff and on 5<sup>th</sup> January 2015 he (PW2) received a letter from the chief accusing him of interfering with the defendant's land and so he went to the Lands Office where he confirmed that the defendant had transferred the suit land to himself. He therefore reported to the Police who advised him to file this suit. He added that the defendant must have taken advantage of the plaintiff's old age to transfer the land into his names.

In his defence, the defendant testified that the plaintiff who is his grandfather gave him the suit land as a gift in 1995 and he put up a home where he lives with his family. Then in 2013, the plaintiff told him that the title deed had been stolen. On 7<sup>th</sup> December 2014, PW2 told him that he wanted to build on the suit land but the plaintiff told him that the land belongs to defendant. So PW2 protested and told the defendant to vacate and it was then that the defendant reported to the chief who summoned PW2 and told him that the land belonged to the defendant after he was shown the title deed. It was then that PW2 reported to the Police and filed this case.

Defendant's witness EVANS MWANGI KIBICHO (DW2) testified that in 2012, the plaintiff told him that he wanted to give the defendant land since he (defendant) had been chased from his

home. Then on another occasion, he met the plaintiff who informed him that he had been to the Land Control Board with the defendant who then moved into the suit land.

At the end of the trial both Mr. Mwangi advocate for the plaintiff and the defendant made submissions.

I have considered the pleadings herein, the viva voce evidence of the parties and their respective documentary exhibits as well as the submissions made.

The following are not in dispute as they are clearly indicated on the Green Card in respect to the suit land:-

1. ***The suit land was on 9<sup>th</sup> January 1976 registered in the name of one KAMUNYA KITHAKA.***
2. ***On 12<sup>th</sup> March 1991 the same was registered in the names of the plaintiff and title deed issued.***
3. ***On 7<sup>th</sup> January 2015, the title deed was issued in the names of the defendant.***
4. ***The defendant is a grandson of the plaintiff who had allowed him to put up a home on the suit land.***
5. ***DAVID KARIUKI KAMUNYA (PW2) is a son to the plaintiff.***

The plaintiff's case is that the defendant fraudulently registered himself as the proprietor of the suit land. The defendant on his part pleads that infact the plaintiff gave him the suit land as a gift and added in his evidence in cross-examination that the plaintiff had been coached.

The determination of this case depends on who between the plaintiff and the defendant is believed by the Court. This is because only the two of them would be privy to what exactly led to the registration of the suit land in the defendant's name. The defendant says it was a gift from the plaintiff. The plaintiff says the defendant fraudulently registered the suit land in his name. During cross-examination by the defendant, the plaintiff said:-

***“I did not give you the land in question. You stole it. It is not true that I gave you the land in 1997 but it is true that I allowed you to put up a house on a portion”***

In his evidence in chief in support of the claim that the suit land was a gift from the plaintiff, the defendant said:-

***“This land subject matter of this suit was given to me by the plaintiff who is my grandfather in 1995 and I cultivated it till 2006 then I built a home there where I lived with my family”***

What this Court finds strange is that if indeed the plaintiff gifted the defendant the suit land in 1995 and he moved onto it in 2006, why did it take till 7<sup>th</sup> January 2015 for the same to be registered in the defendant’s names?

Further, this registration took place soon after 7<sup>th</sup> December 2014 when, by the defendant’s own testimony, the plaintiff’s son (PW2) had gone to the land saying he wanted to build. According to the defendant, it was at that time that the plaintiff told PW2 that he

(plaintiff) had given the land to the defendant. PW2 then protested demanding the cancellation of the title and later on 28<sup>th</sup> December 2014, PW2 asked the defendant to vacate. It could not have been possible that PW2 demanded the cancellation of the title on 7<sup>th</sup> December 2014 when the same was still in the plaintiff’s names. The only reasonable conclusion that this Court can arrive at from that evidence is that having noticed that PW2 was laying a claim to his father (plaintiff’s) land on 7<sup>th</sup> December 2014 and in order to acquire the same for himself, the defendant commenced the process of having the suit land registered in his names which he did on 7<sup>th</sup> January 2015 (exactly one month later). This Court is inclined, therefore, to believe the plaintiff rather than the defendant. If indeed the plaintiff desired to gift the suit land to the defendant, this should have been done way back in 1995 or even 2006 when the defendant was allowed to put up a home on a portion of the same. That the plaintiff intended to give the defendant a portion of the suit land to put up a home is not really in doubt. The plaintiff himself confirms as much. But he denies having gifted the suit land to the defendant and infact accuses him of stealing it. From the evidence and surrounding circumstances, that accusation is not farfetched.

There is also a curious angle to this case which supports the plaintiff rather than the defendant’s claims. Although evidence was not led on this, it is documented in **COTRAN’S RESTATEMENT OF AFRICAN LAW (LAW OF SUCCESSION) SWEET & MAXWELL, LONDON** that under Kikuyu Customary Law, to which the parties herein belong, a father’s land is usually shared by his sons equally although a slightly larger share may go to the eldest son. The defendant herein is only a grandson to the plaintiff and while that does not mean his grandfather cannot gift him land, it would be un-usual, save in clear cases where perhaps a father has fallen out with his son(s), for the plaintiff to have given the suit land to the defendant and completely ignore PW2 who is his son. There was nothing in either the evidence of the plaintiff or PW2 to suggest that the two had fallen foul of each other. Indeed in his evidence in chief, PW2 told the Court that plaintiff could not have kept his children in the dark if he had given the suit land to the defendant. He said:-

***“Plaintiff could not have given the defendant that land without informing his children. Defendant is only his grandchild”***

This Court finds that the fact that the suit land was hurriedly transferred into the defendant’s names soon after the plaintiff’s son (PW2) expressed a desire to put up a house on it and also the fact that the plaintiff denies having gifted it to the defendant and further that the plaintiff’s children were kept in the dark, are all proof that the registration of the suit land in the defendant’s names was procured through fraudulent means. Indeed there is no evidence of when the requisite Land Control Board consent was obtained and if the plaintiff gave his consent to that transfer. In the circumstances, the plaintiff’s claim that the suit land was stolen must be believed by this Court.

Having considered the evidence by both sides, therefore, this Court is satisfied that the plaintiff has proved his case against the defendant as required in law.

Judgment is entered for the plaintiff as per his plaint. Each party shall meet their own costs.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY, 2016**

Judgment delivered in open Court this 26<sup>th</sup> February, 2016

Mr. Macharia for Mr. Ngigi for Plaintiff present

Defendant present in person

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY, 2016**